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October 24, 2008

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Notice of Ex Parte Notification*: Developing a Unified Inter-carrier Regime,
CC Docket No. 01-92

Dear Ms. Dortch:

The suggestion has been made in the ongoing inter-carrier compensation debate that the Commission's current treatment of compensation for ISP-bound traffic cannot be preserved without overhauling the entire inter-carrier compensation framework. That contention is simply false. The Commission can and should segregate the ISP-bound traffic issue, take action to preserve its existing rules and report back separately to the D.C. Circuit on the only issue that has been referred by the Court.

First, it is important to put this issue in context. The entire ISP-bound traffic reciprocal compensation "problem" is a legacy of the past and has largely been resolved by market forces that do not require regulatory intervention. The ISP-bound minutes at issue are those that are derived from "dial-up" Internet access services, and it is plainly evident that the market has shifted dramatically away from dial-up access to broadband Internet access services since the FCC's ISP-bound traffic rules were first adopted. Evidence already placed in the record demonstrates that ISP-bound minutes declined by approximately 40% between 2005 and 2007.¹

¹ See Letter of Melissa Newman, Qwest, to Marlene Dortch, CC Docket No. 96-98, Att. at 6 (April 25, 2008); Letter of John Nakahata, Harris Wilshire, to Marlene Dortch, CC Docket Nos. 99-68 & 01-92, p. 3 (Aug. 18, 2008) ("Level 3 8/18/08 *Ex Parte*").

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Moreover, dial-up ISP-bound traffic is likely to fall by more than an additional 75% between 2007 and 2014.² Indeed, an industry analyst forecasts that dial-up access household market penetration, which already has declined precipitously, will fall nearly 80% more between 2007 and 2014.³ Importantly, the tremendous decrease in demand for dial-up ISP-bound access is being driven by consumer adoption of broadband access platforms, not by the Commission's ISP-bound traffic reciprocal compensation rules. Thus, the continued need for special compensation rules for ISP-bound traffic is highly doubtful, and for such rules to be used as a pretext for comprehensive intercarrier compensation reform is a truly baffling case of the "tail wagging the dog."

Second, even if the Commission decides that it is necessary to preserve its existing special rules governing ISP-bound traffic, the record is replete with alternative legal bases available to the Commission to justify its prior action. As suggested by Level 3, perhaps the best option available to the Commission is to make clear that Section 201, as preserved by Section 251(i), "retains for the Commission the residual authority to set prices for traffic that also falls within Section 251(b)(5), provided the FCC acts consistently with Section 252(d)(2)'s pricing standards."⁴ Once the Commission has determined that ISP-bound traffic is jurisdictionally interstate, it can regard Section 201 and Section 251(b)(5) as complementary and exercise regulatory authority over the traffic at issue, including adopting pricing rules that are consistent with the pricing requirements of Section 252(d)(2). Indeed, as pointed out by Level 3, the situation is highly analogous to the Commission's treatment of CMRS traffic, where the Commission has determined that the classification of CMRS traffic as jurisdictionally interstate under Section 332 enables it to regulate CMRS interconnection pursuant to Section 201.⁵

Notably, the legal theory in support of the Commission's existing ISP-bound traffic rules suggested by Level 3 is by no means the only one placed into the record. AT&T and others have offered briefs that provide legal rationales for retaining its existing regulatory framework.⁶ What is clear is that the Commission has multiple legal theories available to it for defense of its ISP-bound traffic rules in response to the Court's mandamus, even if -- as it need not do -- the Commission elects to retain them.

² Level 3 *Ex Parte* at 4.

³ *Id.*; see, Frost & Sullivan, "North American Residential Broadband Access," Fig. I-9, p. I-29 (2008)

⁴ Level 3 *Ex Parte* at 2-3, 8-15

⁵ *Id.* at 9-10.

⁶ See, e.g., Letter of Gary Phillips, AT&T, to Marlene Dortch, CC Docket Nos. 01-92, 96-98) (May 9, 2008).

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Hence, the argument that comprehensive intercarrier compensation reform is required in order for the Commission to reply to the D.C. Circuit's November 5 mandamus order is incorrect. The truth is that the Court's mandamus is being misused as an excuse to bootstrap action on other items that proponents want to rush through without adequate review before the national election occurs. This is improper in the extreme, and can only lead to a number of serious policy errors. Accordingly, we again urge the Commission to reply to the Court on the ISP-bound traffic issue separately on November 5, and refer broader intercarrier compensation reform plans for public comment pursuant to a Further Notice of Proposed Rulemaking.

Sincerely,



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